No. 17-9560

In The
Supreme Court of the United States

HAMID MOHAMED AHMED ALI REHAIF,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

REPLY TO THE UNITED STATES' BRIEF IN OPPOSITION

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PETITION FOR A WRIT OF CERTIORARI

I. The government ignores the plain meaning of § 924(a)(2)'s "knowingly violates" provision.

In his petition, Mr. Rehaif explained how 18 U.S.C. § 924(a)(2) provides the penalty for anyone who "knowingly violates" 18 U.S.C. § 922(g).[1] He argued that a plain reading of the statutes shows that the "knowingly violates" provision should apply equally to the possession and status elements of a § 922(g) crime. Pet. 5-6.

To support his argument, Mr. Rehaif relied heavily on the reasoning of then-Judge, now-Justice, Gorsuch in *United States v. Games–Perez*, 667 F.3d 1136 (10th Cir. 2012), and *United States v. Games-Perez*, 695 F.3d 1104 (10th Cir. 2012) (en banc). Pet. 8-11. Then-Judge Gorsuch explained that the plain language of the statutes should require the *mens rea* of "knowingly violates" found in § 924(a)(2) to apply to both non-jurisdictional elements of a § 922(g) offense. He stated that it "defies linguistic sense" for the word "knowingly" to apply to the possession of a firearm, but not to the status of the possessor that makes the possession illegal. 667 F.3d at 1143. Then-Judge Gorsuch opined that "we might be better off applying the law Congress wrote . . . It is a perfectly clear law as it is

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[1] Section 922(g) prohibits persons in nine enumerated categories from possessing a firearm or ammunition. One of those categories is being an alien illegally or unlawfully in the United States. *See* 18 U.S.C. § 922(g)(5).

written, plain in its terms, straightforward in its application." Pet. 10 (quoting *Games–Perez*, 667 F.3d at 1145-46). Construing the statutes' plain language, then-Judge Gorsuch concluded that resort to canons of statutory construction was unnecessary because "the *law* before us that survived the gauntlet of bicameralism and presentment couldn't be plainer. By their express terms, §§ 922(g) and 924(a)(2) do not authorize the government to imprison [persons] unless and until the government can show they *knew* of their [prohibited] status at the time of the alleged offense." *Games-Perez*, 695 F.3d at 1118.

The government's response is to ignore everything then-Judge Gorsuch said in the two *Games-Perez* cases. BIO at 5-11. Instead, the government relies on circuit cases where the "knowingly" requirement was only applied to the possession element of the crime, not the status element; Congress's lack of action since passage of the Firearms Owners' Protection Act in 1986; and other petitions that this Court has declined to review. BIO at 6-8. Nowhere does the government attempt to explain how "knowingly violates" can be read to apply to the possession element of a § 922(g) crime, but not also to the status element.

The government relies on *Staples v. United States*, 511 U.S. 600, 605 (1994), for the proposition that determining the mental state required for commission of a federal offense requires construction of the statute and inference of the intent of Congress. BIO at 9. *Staples*, though, is distinguishable. The statute

at issue in *Staples* made it "unlawful for any person" to possess an unregistered machine gun. 26 U.S.C. § 5861(d). Like here, § 5861 did not contain a *mens rea* requirement, and the penalty upon conviction was set out in a different statute. *See* 26 U.S.C. § 5871. Unlike here, however, the penalty statute in *Staples* did not have an explicit *mens rea* requirement: "Any person who violates or fails to comply with any provision of this chapter shall, upon conviction, be fined not more than $10,000, or be imprisoned not more than ten years, or both." *Id.* In contrast, § 924(a)(2) sets out the punishment for anyone who "knowingly violates" § 922(g). There is thus no need to infer the intent of Congress regarding *mens rea* in a § 922(g) case because Congress's intent is clearly set out in the statute.

For the same reason, the government's reliance on legislative history, BIO at 10-11, is misplaced. As explained in Mr. Rehaif's petition, the starting point for any statutory interpretation is the language of the statute, and when that language is plain, the sole function of the court is to enforce the statute according to its terms. Pet. 6-7 (citing cases).

The government's reliance on *Elonis v. United States*, 135 S. Ct. 2001 (2015), is similarly misplaced. BIO at 11. The statute at issue in *Elonis*, 18 U.S.C. § 875(c), "does not specify any required mental state." 135 S. Ct. at 2009. It was in that context that the Court wrote: "When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute only that *mens rea*

which is necessary to separate wrongful conduct from otherwise innocent conduct." *Id.* at 2010 (citation and internal quotation marks omitted); *see* BIO at 11. Here, it is neither necessary nor proper to "read into the statute" a *mens rea* when the statute already explicitly contains a *mens rea* ("knowingly violates").

II. This case is an excellent vehicle for considering this important issue.

The government asserts that this case is not a good vehicle for considering the *mens rea* required by §§ 922(g) and 924(a)(2) because "the undisputed facts demonstrate that petitioner knew of his restricted status." BIO at 12. But, as acknowledged below, Mr. Rehaif's planned defense was that he did not know he was in the United States illegally or unlawfully, and that defense was eviscerated by the district court's jury instruction that the government need not prove that he knew he was in the United States illegally or unlawfully. Pet. App. 6a.

The government relies on emails Florida Institute of Technology (FIT) sent to Mr. Rehaif advising him of the termination of his immigration status after he was academically dismissed, BIO at 12, but there was no attempt by FIT to confirm that Mr. Rehaif had received the emails. Doc. 108 at 233. Nor was there any attempt to talk with Mr. Rehaif on the telephone, or to set up a meeting with him. *Id.* at 233-34. Mr. Rehaif did not respond to either email. *Id.* at 218-19. It was a potential defense, then, to argue that Mr. Rehaif never received the FIT email and thus did not know his immigration status had been terminated. But that defense

was not viable in light of the contested jury instruction given below: "The United States is not required to prove that the Defendant knew that he was illegally or unlawfully in the United States." Doc. 69 at 16.

The government also relies on the testimony of an FBI agent that Mr. Rehaif admitted being aware that his student visa was out of status. BIO at 12-13. The interview, though, was not recorded and the other two law enforcement agents present for the interview did not testify. Doc. 109 at 99-101. That testimony could also have been vigorously challenged, then, if the jury had been correctly instructed that the government had to prove Mr. Rehaif was aware of his status as an alien illegally in the United States.

Finally, the government points out that this case concerns § 922(g)(5), while the majority of § 922(g) prosecutions concern § 922(g)(1). That is a meaningless distinction. The question of law this Court is being asked to decide is whether, pursuant to the "knowingly violates" provision of § 924(a)(2), the government must prove in <u>every</u> § 922(g) case that the defendant knew of his status as a prohibited person.

The issue presented here is important as it affects thousands of prosecutions every year. The issue is vexing because, thus far, no one has explained how then-Judge Gorsuch erred by analyzing the plain language of § 924(a)(2) to require a defendant know of his status as a prohibited person in a § 922(g) prosecution. The

analysis by other courts misses the mark because those courts do not begin with a careful consideration of the plain language of the statute. That plain language ("knowingly violates") is clear and unambiguous, so all that is left for courts to do is enforce that requirement. Finally, this case is an ideal vehicle as the issue was fully preserved below and addressed on its merits by the court of appeals.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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